

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 PAUL HUPP, )  
12 )  
13 Plaintiff(s), )  
14 v. )  
15 CITY OF WALNUT CREEK, et )  
16 al., )  
17 Defendant(s). )  
\_\_\_\_\_)

No. C 03-5387 BZ

**ORDER ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT**

18 Paul Hupp filed this action pursuant to 42 U.S.C. §§ 1983  
19 and 1988 alleging violations of the Fourth and Fourteenth  
20 Amendments of the United States Constitution, against the City  
21 of Walnut Creek and Walnut Creek Police Officer Mitchell  
22 Rebello. The complaint alleges that defendants violated  
23 plaintiff's constitutional rights by unlawfully seizing his  
24 person and vehicle and using excessive force in handcuffing  
25 him. The complaint also alleges that defendants intentionally  
26 inflicted emotional distress on plaintiff and that the City of  
27 Walnut Creek was grossly negligent in hiring, training and  
28 supervising its officers. The parties have filed cross

1 motions for summary judgment.<sup>1</sup>

2 The undisputed material facts and evidence establish that  
3 on November 21, 2003, at about 9:30 a.m., Officer Rebello,  
4 while working a seatbelt enforcement detail, stopped Mr. Hupp  
5 for wearing his seatbelt under his left arm instead of over  
6 his upper torso.<sup>2</sup> Officer Rebello cited plaintiff for  
7 violating Cal. Veh. Code § 27315(d)(1) and asked plaintiff to  
8 sign the "promise to appear" portion of the citation.<sup>3</sup>  
9 Plaintiff did not sign but asked to be taken before a  
10 magistrate. Officer Ichimaru and Sergeant Martinez of the  
11 Walnut Creek Police Department arrived to assist Officer  
12 Rebello. Officer Rebello informed Sergeant Martinez that  
13 plaintiff had failed to sign the "promise to appear" and had  
14 requested to appear before a magistrate. Officer Rebello then  
15 handcuffed plaintiff and took him into custody. Plaintiff  
16 complained that the handcuffs were too tight, and Officer  
17 Ichimaru adjusted them. Officer Rebello then arranged for the  
18 towing and storage of plaintiff's truck pursuant to Cal. Veh.  
19 Code §§ 22650 and 22850. Plaintiff was taken before a  
20 magistrate, arraigned on the charges in the citation and

---

21  
22 <sup>1</sup> All parties have consented to my jurisdiction  
23 pursuant to 28 U.S.C. § 636(c).

24 <sup>2</sup> Plaintiff's objection to defendants' use of portions  
25 of his deposition in their motion is overruled. Pursuant to  
26 Fed. R. Civ. P. 32(a)(4) plaintiff may require defendants "to  
introduce any other part which ought in fairness to be  
considered with the part introduced." He has not done so, nor  
introduced those portions himself.

27 <sup>3</sup> Plaintiff was also cited for failing to notify the  
28 DMV that his address had changed. He was convicted of this  
offense, and while mentioned in his complaint, he does not  
appear to challenge the constitutionality of this citation.

1 released. On December 23, 2005, after a trial in the Traffic  
2 Court, he was found guilty and fined. He did not appeal.<sup>4</sup>

3 Summary judgment is appropriate when there is no genuine  
4 issue as to any material facts and the moving party is  
5 entitled to judgment as a matter of law. Fed. R. Civ. P. 56.  
6 There is no genuine issue of material fact where "the record  
7 taken as a whole could not lead a rational trier of fact to  
8 find for the non-moving party." Matsushita Elec. Indus. Co.  
9 v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The moving  
10 party need not produce admissible evidence showing the absence  
11 of a genuine issue of material fact when the non-moving party  
12 has the burden of proof, but may discharge its burden simply  
13 by pointing out that there is an absence of evidence to  
14 support the non-moving party's case. See Celotex Corp. v.  
15 Catrett, 477 U.S. 317, 324-325 (1986). Once the moving party  
16 has done so, the non-moving party must "go beyond the  
17 pleadings and by her own affidavits, or by the depositions,  
18 answers to interrogatories, and admissions on file, designate  
19 specific facts showing that there is a genuine issue for  
20 trial." Id. at 324. When determining whether there is a  
21 genuine issue for trial, "inferences to be drawn from the  
22 underlying facts . . . must be viewed in the light most  
23 favorable to the party opposing the motion." Matsushita, 475  
24 U.S. at 587. Although the parties have filed cross motions,  
25 where required, the Court has viewed the facts in the light  
26

---

27  
28 <sup>4</sup> Plaintiff asserts he did not appeal because the fine  
"was not worth the time, effort and money to appeal." Hupp  
Decl. ¶ 77. In any case, the convictions stand.

1 most favorable to plaintiff.<sup>5</sup>

2 Plaintiff first claims his arrest was unconstitutional.  
3 Since plaintiff was convicted of the charges for which he was  
4 arrested, plaintiff cannot now file a civil rights claim that  
5 challenges the basis for his arrest. Heck v. Humphrey, 512  
6 U.S. 477 (1994). Having been convicted of failing to wear his  
7 seatbelt properly, he cannot now claim that it was  
8 unconstitutional for Officer Rebello to arrest him for not  
9 wearing his seatbelt properly.

10 Putting the rule of Heck aside, plaintiff's arrest was  
11 not invalid. California law makes it illegal to drive a car  
12 unless "properly restrained by a safety belt." Cal. Veh. Code  
13 § 27315(d)(1). Officer Rebello had probable cause to arrest  
14 plaintiff upon observing plaintiff wearing his seatbelt under  
15 his left arm and not across his upper torso. It is not  
16 unconstitutional to arrest a driver for failing to wear a  
17 seatbelt. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).  
18 Under California law, a police officer who stops a driver for  
19 a seatbelt violation may issue that person a citation if the  
20 driver "promises to appear." When plaintiff requested to be  
21 taken before a magistrate instead of signing the "promise to  
22 appear" portion of the citation, Officer Rebello was  
23 authorized to arrest plaintiff under California law. Cal.  
24 Pen. Code § 853.5(a); Cal. Veh. Code § 40302. Therefore,  
25 plaintiff's motion for summary judgment on the illegal seizure  
26 claim is **DENIED**, and defendants' motion for summary judgment

---

27  
28 <sup>5</sup> Plaintiff is a pro se litigant who has graduated from  
law school but is not a practicing attorney.

1 is **GRANTED**.

2 Plaintiff next claims Officer Rebello used excessive  
3 force in handcuffing him. This excessive force claim is not  
4 supported by the facts of this case. Viewed most favorably to  
5 plaintiff, the facts are that Officer Rebello, upset because  
6 plaintiff questioned him about seatbelt design and usage and  
7 asked to be taken before a magistrate, "used extra ordinary  
8 [sic] and violent force handcuffing" plaintiff, and plaintiff  
9 "requested the supervising officer to loosen the handcuffs . .  
10 .. After loosening the handcuffs [plaintiff's] thumbs were  
11 still numb, and [he] asked to have them loosened a second  
12 time, which the supervising officer did again." (Hupp Decl.  
13 ¶¶ 45-46). Plaintiff presents no evidence other than his  
14 subjective complaints that the handcuffs produced any bruising  
15 or caused any physical injury. He does not provide  
16 corroborating evidence from medical records or other  
17 witnesses. Plaintiff admits that defendants did not ignore  
18 his complaint that the handcuffs were tight but adjusted them  
19 twice. The force used to handcuff plaintiff seems no  
20 different from the force used to handcuff Ms. Atwater.  
21 Atwater 532 U.S. at 354-55. In cases where the Ninth Circuit  
22 has held that excessively tight handcuffing can constitute a  
23 Fourth Amendment violation, plaintiffs either were  
24 demonstrably injured by the handcuffs or their complaints  
25 about the handcuffs being too tight were ignored by the  
26 officers. See e.g., Wall v. County of Orange, 364 F.3d 1107,  
27 1109-20 (9th Cir. 2004) (doctor testified arrestee suffered  
28 nerve damage); LaLonde v. County of Riverside, 204 F.3d 947,

1 952, 960 (9th Cir. 2000) (arrestee complained to officer who  
2 refused to loosen handcuffs); Palmer v. Sanderson, 9 F.3d  
3 1433, 1434-36 (9th Cir. 1993) (arrestee's wrists were  
4 discolored and officer ignored his complaint). Compare  
5 Gonzalez v. Pierce County, 2005 WL 2088367 at \*9 (W.D. Wash.  
6 August 29, 2005) (affirming dismissal of excessive force claim  
7 because "plaintiff never complained to officers nor has she  
8 shown any injury or specific facts that would show more than  
9 *de minimis* discomfort"). Absent in this case is evidence of a  
10 physical manifestation of injury or of a complaint about tight  
11 handcuffs that was ignored. Plaintiff's motion for summary  
12 judgment on the excessive force claim is **DENIED** and  
13 defendants' motion is **GRANTED**.

14 Defendants are also entitled to summary judgment on  
15 plaintiff's claim that defendants unlawfully and  
16 unconstitutionally seized his property by towing and storing  
17 his vehicle after his arrest. Although plaintiff provides no  
18 authority that Cal. Veh. Code §§ 22651(h)(1) and 22852 are  
19 unconstitutional, he appears to base his claim on the  
20 following arguments: Cal. Veh. Code § 22651(h)(1) is  
21 unconstitutional because it fails to advance a legitimate  
22 government interest, and Cal. Veh. Code § 22852 is  
23 unconstitutional because an institutionally biased party is  
24 allowed to adjudicate the hearing and the statute does not  
25 provide for judicial review of the final determination.

26 Plaintiff's argument regarding Cal. Veh. Code §  
27 22651(h)(1) fails. Impounding an unattended vehicle advances  
28 a number of legitimate government purposes. South Dakota v.

1 Opperman, 428 U.S. 364, 369 (1976) ("The authority of the  
2 police to seize and remove from the streets vehicles impeding  
3 traffic or threatening public safety and convenience is beyond  
4 challenge"). Impounding a vehicle when the driver has been  
5 arrested and there is no responsible adult present to  
6 immediately take custody of the vehicle also has a legitimate  
7 government purpose. United States v. Ponce, 8 F.3d 989, 995-  
8 96 (5th Cir. 1993) ("[T]he Supreme Court recognized that  
9 automobiles are impounded [i]n the interests of public safety  
10 and as part of what the Court has called 'community caretaking  
11 functions.'" (quoting Opperman 428 U.S. at 368) (internal  
12 quotations omitted)). In the instant case, plaintiff was  
13 properly arrested, and his vehicle could have been left  
14 unattended for a long time.<sup>6</sup> Plaintiff has failed to show  
15 that Cal. Veh. Code § 22651(h)(1) advances no legitimate  
16 government interest and is unconstitutional.<sup>7</sup> Plaintiff's

---

18 <sup>6</sup> Other circuits have addressed the constitutionality  
19 of similar impoundment statutes. United States v. Duguay, 93  
20 F.3d 346, 354 (7th Cir. 1996) ("Impoundments by Illinois police  
21 have been affirmed in many circumstances where the arrestee  
22 could not provide for the speedy and efficient removal of the  
23 car, such as where the driver is the sole occupant and is  
legitimately arrested"). Cabbler v. Superintendent, Virginia  
State Penitentiary, 528 F.2d 1142, 1146 (4th Cir.  
1975) (accepting as a reason for impounding a car after the  
driver's arrest "to give protection to the personal effects of  
a prisoner").

24 <sup>7</sup> Officer Rebello's statement that he would teach  
25 plaintiff a lesson by having his truck impounded does not alter  
26 this analysis. The thrust of California's regulatory scheme is  
27 to encourage a driver stopped for a minor traffic offense to  
28 sign a "promise to appear." The lesson to be learned from  
failing to do so is the one plaintiff learned; the driver is  
subject to arrest and where there is no one to tend to the  
vehicle, it may be impounded. While the remark may have been  
gratuitous, it does not convert the lawful impoundment of the  
vehicle into an unconstitutional act.

1 motion for summary judgment with respect to this issue is  
2 **DENIED** and defendants' motion is **GRANTED**.

3 As for plaintiff's first argument regarding Cal. Veh.  
4 Code § 22852, the Ninth Circuit has held that "[t]here is no  
5 constitutional requirement that the decisionmaker be an  
6 uninvolved person when a property interest protected by due  
7 process is at stake." Jordan v. City of Lake Oswego, 734 F.2d  
8 1374, 1376 (9th Cir. 1984). The Circuit has rejected  
9 plaintiff's institutional bias argument in other cases  
10 involving towing and storage of vehicles. See David v. City  
11 of Los Angeles, 307 F.3d 1143, 1147 (9th Cir. 2002), *rev'd on*  
12 *other grounds*, 538 U.S. 715 (2003), *remanded to* 335 F.3d 857  
13 (9th Cir. 2003) (denying plaintiff's claim that the "mere fact  
14 that the hearing examiner was employed by the agency-or the  
15 City-was sufficient to show a due process violation because  
16 the officer who ordered the towing and storage worked for the  
17 agency also").<sup>8</sup>

18 Plaintiff's second argument similarly fails. Plaintiff  
19 has not cited any authority that due process requires a right  
20 to judicial review of administrative decisions. In fact, the  
21 Ninth Circuit rejected plaintiff's argument in Conner v. City  
22 of Santa Ana, 897 F.2d 1487, 1492-93 (9th Cir. 1990) ("There is  
23 no requirement, however, that a court must be involved in the  
24

---

<sup>8</sup> Plaintiff also contends his constitutional rights  
25 were violated because he did not receive notice of the storage  
26 of his vehicle until December 2, 2003, and Cal. Veh. Code §  
27 22852(b) requires such notice to be mailed or delivered within  
28 48 hours. The 10-day delay between the impoundment and storage  
of plaintiff's vehicle and his receipt of notice does not  
amount to a constitutional violation. David, 538 U.S. at 718-  
19 (holding that a 30-day delay in holding a hearing regarding  
an impounded automobile does not violate due process).



1 process in order to comply with the constitution"). In any  
2 event, the Ninth Circuit noted in Conner, plaintiff "did have  
3 a right to judicial review" under Code Civ. Proc., § 1094.5.  
4 Id. at 1493. As in Conner, plaintiff does not claim that he  
5 attempted to exercise such right in this case. Therefore,  
6 plaintiff's motion for summary judgment that Cal. Veh. Code §  
7 22852 is unconstitutional is **DENIED** and defendants' motion is  
8 **GRANTED.**<sup>9</sup>

9 The City of Walnut Creek is also entitled to summary  
10 judgment on the claim that the City failed to hire, train and  
11 supervise its officers properly. Such failures may subject  
12 the municipality to liability under § 1983 only if they injure  
13 a plaintiff and evidence a deliberate indifference to  
14 constitutional rights. See City of Canton v. Harris, 489 U.S.  
15 378, 390-91 (1989). A municipality is deliberately  
16 indifferent when it is "on actual or constructive notice of  
17 the need to train." Farmer v. Brennan, 511 U.S. 825, 841  
18 (1994). A local government may not be liable for damages for  
19 civil rights violations based on the doctrine of respondeat  
20 superior. As a result, a government body cannot be held  
21 liable under § 1983 merely because it employs a tortfeasor.  
22 Monell v. Department of Soc. Services, 436 U.S. 658, 691-92  
23 (1978).

24 Based on the record before the Court, plaintiff has not  
25 proven that the hiring process or training or supervision of

---

26 <sup>9</sup> In view of the Court's findings that plaintiff's  
27 constitutional rights were not violated, I need not reach  
28 Officer Rebello's further argument that he is entitled to  
qualified immunity because the constitutional rights were not  
clearly established.

1 Officer Rebello was inadequate or what additional steps in  
2 hiring, training and supervising were necessary or  
3 appropriate. Plaintiff has not met the Celotex burden to  
4 counter defendants' motion for summary judgment. Therefore,  
5 the record taken as a whole could not lead a rational trier of  
6 fact to find for plaintiff with respect to this claim.  
7 Plaintiff's motion for summary judgment against the City of  
8 Walnut Creek is **DENIED** and the City's motion for summary  
9 judgment is **GRANTED**.

10 Plaintiff additionally accuses defendants of intentional  
11 infliction of emotion distress. While plaintiff claims to  
12 have felt extreme humiliation from having to walk through a  
13 courtroom lobby while handcuffed and in his gym clothes,  
14 plaintiff has not established that defendants' conduct was  
15 extreme and outrageous as to go beyond all possible bounds of  
16 decency. Davidson v. City of Westminster, 32 Cal.3d 197, 209  
17 (1982). After all, it was plaintiff, dressed in gym clothes,  
18 who did not "promise to appear" and asked to be taken to  
19 court. Accordingly, plaintiff's motion for summary judgment  
20 on the intentional infliction of emotional distress is **DENIED**  
21 and defendants' motion for summary judgment is **GRANTED**.

22 It is hereby **ORDERED** that defendants' motion for summary  
23 judgment on the complaint is **GRANTED** and plaintiff's motion  
24 for summary judgment is **DENIED**. Plaintiff's request for

25 ///

26 ///

27 ///

28 ///

1 attorney's fees is **DENIED**.<sup>10</sup>

2 Dated: September 30, 2005

3  
4 

---

 Bernard Zimmerman  
5 UNITED STATES MAGISTRATE JUDGE

6 G:\BZALL\BZCASES\HUPP\SJM.ORDER.wpd  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

27 

---

  
28 <sup>10</sup> Plaintiff's and defendants' evidentiary objections  
are overruled. The disputed evidence did not affect the  
outcome of the Court's decision.